

---

# **Secretarial Order - American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act**

## ***A Primer***

***By***

***G. S. Sims, Ph.D.  
NWR Tribal Liaison***

---

# Sec. 1 Purpose and Authority

---

- Acknowledges trust responsibility and treaty obligations to Indian tribes and tribal members and government-to-government relationship in dealing with tribes.
  - DoC/Dol carry out responsibilities under the ESA in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions.
  - DoC/Dol “strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.”
-

## Sec. 2. Scope and Limitations

---

- A. SO for **guidance** ... is consistent with existing law
  - B. no new rights or restrictions to existing rights
  - C. not preempt/modify existing statutory authorities
  - D. not authorize directed take or jeopardy
  - E. no additional procedural requirements for substantially completed Departmental actions
  - F. implementation subject to availability of resources
  - G. tribes/departments can develop implementing strategies
  - H. not supersede existing Department/agency-tribal agreements.
-

# Sec. 3. Definitions

---

- A. **Indian Tribe** ... federally recognized tribes identified on BIA list.
  - B. **Tribal Trust Resources** ... natural resources, on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.
  - C. **Tribal Rights** ... rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.
  - D. **Indian Lands** ... lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.
-

# Sec. 4. Background

---

- ❑ Unique and distinctive political relationship between US and tribes defined by treaties, statutes, executive orders, judicial decisions, and agreements ... different than other relationships with Federal government.
  - ❑ Special trust responsibilities and obligations of US toward tribes and application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and exercise of tribal rights.
  - ❑ Recognize importance of tribal self-governance and protocols for government-to-government relationships.
  - ❑ Long-standing Congressional and Administrative policies promote self-government, self-sufficiency, self-determination, recognizing and endorsing fundamental right of tribes to set own priorities and make decisions affecting their resources and distinctive ways of life.
-

## Sec. 4. Background – continued

---

- ❑ Recognize and respect ... consider ... value of tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities.
  - ❑ Recognize tribes are governmental sovereigns; inherent in this sovereign authority ... power to make and enforce laws, administer justice, manage and control Indian land, exercise tribal rights and protect tribal trust resources.
  - ❑ Sensitive to fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.
-

## Sec. 4. Background - continued

---

- Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws.
  - Retained by tribes or were set aside for tribal use ... managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.
-

## Sec. 4. Background – Continued

---

- Because of unique government-to-government relationship between Indian tribes and the US ... need to **establish and maintain effective working relationships and mutual partnerships** to promote the conservation of sensitive species and their ecosystems ... focus on **cooperative assistance, consultation, sharing of information and creation of government-to-government partnerships** to promote healthy ecosystems.
  - Departments **may work with intertribal organizations**, to the extent that such organizations are **authorized by their member tribes** to carry out resource management responsibilities.
-



## Sec. 5. Responsibilities

---

- ❑ To achieve objectives of the SO the heads of all agencies, bureaus and offices with DoI, and the Administrator of NOAA, shall be responsible for ensuring that the following directives (identified as Principles) are followed.
  - ❑ There are five Principles
-

# Sec. 5 Responsibilities – The 5 Principles

---

The Departments Shall:

1. **Work Directly with Indian Tribes** on Government-to-Government Basis to Promote Healthy Ecosystems
  2. Recognize **Indian Lands Are Not** Subject to the Same Controls as **Federal Public Lands**
  3. **Assist Tribes in Developing and Expanding Tribal Programs** so Healthy Ecosystems are Promoted and Conservation Restrictions are Unnecessary.
  4. Be **Sensitive to Indian Culture, Religion, and Spirituality**
  5. **Make Available** to Indian Tribes **Information** Related to Tribal Trust Resources and Indian Lands ... Shall Strive to **Protect Sensitive Tribal Information** from Disclosure.
-

# Sec. 5. Responsibilities – Principle 1

---

## 1. Work Directly with Indian Tribes on a Government-to-Government Basis to Promote Healthy Ecosystems.

- Recognize **unique and distinctive political and constitutionally based relationship** ... tribal governments as sovereign entities with authority and responsibility for health and welfare of ecosystems on Indian lands ... inherent powers to make and enforce laws, administer justice, and manage and control their natural resources.
  - **Seek to establish effective government-to-government working relationships** to achieve common goal of promoting and protecting health of ecosystems.
-

# Sec. 5. Responsibilities

## Principle 1 Continued

---

- Whenever **aware** that actions planned under ESA may impact tribal trust resources, the exercise of tribal rights, or Indian lands ... **consult** with, and **seek participation** of, **affected tribes to the maximum extent practicable**.
  - **Provide** affected tribes adequate **opportunities to participate** in data collection, consensus seeking, and associated processes.
  - May coordinate discussions with a representative from an **intertribal organization**, if so designated by the affected tribe(s).
  - Except for enforcement investigations ... to maximum extent practicable .. **obtain permission** from tribes **before knowingly entering Indian reservations and tribally owned fee lands** for purposes of ESA related activities ... communicate as necessary with appropriate tribal officials ... **if tribe believes this section violated ... may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.**
-

# Sec. 5. Responsibilities – Principle 2

---

## 2 Indian Lands Are Not Subject to the Same Controls as Federal Public Lands.

- **Indian lands**, whether held in trust by the US ... or owned exclusively by an Indian tribe ... **not subject to controls or restrictions** set forth in **Federal public land laws**.
  - Indian lands are **not federal public lands** or part of public domain.
  - Tribes **manage Indian lands in accordance with tribal goals and objectives**, within framework of applicable laws.
-

# Sec. 5. Responsibilities – Principle 3

---

3. **Assist Indian in Developing and Expanding Tribal Programs so that Healthy Ecosystems are Promoted and Conservation Restrictions are Unnecessary.**
    - A. **Assist tribes in developing and expanding tribal programs that promote healthy ecosystems.**
      - Take affirmative steps to achieve common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relations ... **assist tribes develop and expand tribal programs** that promote health of ecosystems upon which sensitive species depend.
      - **Offer and provide scientific and technical assistance and information** ... development of tribal conservation and management plans to promote maintenance, restoration, enhancement and health of their ecosystems... including **cooperative identification of appropriate management measures** to address concerns for such species and their habitats.
-

# Sec. 5. Responsibilities – Principle 3

---

## **B. Recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.**

- In keeping with federal policy promoting tribal self-government ... **respect exercise of tribal sovereignty over management of Indian lands, and tribal trust resources.**
  - Shall **give deference to tribal conservation and management plans for tribal resources** that:
    - (a) **governs activities on Indian lands**, including tribally-owned fee lands;
    - (b) **address the conservation needs of listed species.**
  - Conduct government-to-government consultations to discuss extent to which **tribal resource management plans for tribal trust resources outside Indian lands** can be incorporated into actions that address conservation needs of listed species.
-

# Sec. 5. Responsibilities – Principle 3

---

## c. The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.

- At **earliest indication** of need for **federal conservation restrictions** being **considered** ... acting in trustee capacities ... **promptly notify** all potentially **affected tribes** ... provide such technical, financial, or other assistance as may be appropriate ... **assisting tribes identify and implement conservation and other measures** necessary to protect such species.
  - If ... determine conservation restrictions necessary to protect listed species ... **consult with affected tribes and provide written notice of the intended restriction** as far in advance as practicable.
  - If proposed **restriction** directed at tribal activity that **could raise potential issue of direct take** ... **then meaningful government-to-government consultation shall occur** ... to strive to harmonize trust responsibility, tribal sovereignty, and statutory missions of the Departments
  - In cases involving activity that could raise potential issue of **incidental take** ... **notice shall include analysis and determination that all conservation standards have been met** (*also called Conservation Necessity Principles Analysis*):
-



# Sec. 5. Responsibilities – Principle 3

---

- There are five conservation standards:
    - (i) The **restriction is reasonable and necessary** for the conservation of the species at issue;
    - (ii) The conservation purpose of the restriction **cannot be achieved by reasonable regulation of non-Indian activities**;
    - (iii) The measure is the **least restrictive alternative** available to achieve the required conservation purpose;
    - (iv) The **restriction does not discriminate** against Indian activities, either as stated or applied; and,
    - (v) **Voluntary tribal measures are not adequate** to achieve the necessary conservation purpose.
-

# Sec. 5. Responsibilities – Principle 4

---

## 4. Sensitive to Indian Culture, Religion and Spirituality.

- Take into consideration **impacts** of their actions and policies under ESA on **Indian use of listed species for cultural and religious purposes**.
  - **Avoid or minimize**, to extent practicable, adverse effects upon noncommercial use of listed sacred plants and animals in **medicinal treatments and in the expression of cultural and religious beliefs** by Indian tribes.
  - When appropriate ... may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.
-

# Sec. 5. Responsibilities – Principle 5

---

- 5. Make Available to Indian Tribes Information Related to Tribal Trust Resources and Indian Lands, and, Facilitate the Mutual Exchange of Information, Shall Strive to Protect Sensitive Tribal Information from Disclosure.**
- Recognize critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources.
  - To extent consistent with law ... **make available all information** related to Indian lands and tribal trust resources.
  - In mutual exchange on information ... **protect to maximum extent practicable**, tribal information disclosed or collected.
  - Promptly notify, and when appropriate, consult with affected tribes regarding all **requests for tribal information** relating to the administration of the Act.
-

## Sec. 6. Federal-Tribal Intergovernmental Agreements

---

- When appropriate, and at request of tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species; e.g.,
    - Land and resource management, multi-jurisdictional partnerships, cooperative law enforcements, and guidelines to accommodate Indian access to, and traditional uses of, natural products.
-

## Sec. 7. Alaska

---

- ☐ Order not apply to Alaska.
  - ☐ Departments, within one year, develop recommendations to supplement or modify SO or Appendix.
-

# Sec. 8 Special Study on Cultural and Religious Use of Natural Resources

---

- ☐ Tribal concerns regarding access to, uses of, eagle feathers, animal parts, and other natural product for Indian cultural religious purposes.
  - ☐ Work with tribes to develop recommendations, within one year, to revise or establish uniform administrative procedures to govern possession, distribution, and transportation natural products under federal jurisdiction or control
-

# Sec. 9. Dispute Resolution

---

- ❑ Federal-tribal disputes regarding implementation of SO, addressed through **government-to-government discourse**.
  - ❑ **Alternative dispute resolution processes may be employed** as necessary to resolve disputes on technical or policy issues within statutory time frames.
  - ❑ Alternative processes not intended to **apply** to investigative or prosecutorial law enforcement activities.
  - ❑ Questions and concerns about use or possession of listed plants/animal parts used for religious or cultural purposes ... referred to appropriate Departmental officials and appropriate tribal contacts for religious and cultural affairs.
-

## Sec. 10. Implementation

---

- ☐ Implemented by all agencies, bureaus, and offices, as applicable.
  - ☐ NMFS shall implement their specific responsibilities under the Act with guidance contained in attached Appendix.
-



## Sec. 11. Effective Date

---

- ☐ Issued within Dol as No. 3206 ... effective immediately.
  - ☐ Entitled: *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* ... and accompanying Appendix issued by Secretary of the Interior and Secretary of Commerce, June 5, 1997.
-

# Appendix – Sec. 1. Purpose

---

- ❑ Provide policy to national, regional, and field offices.
  - ❑ This policy furthers the objectives of *American Indian and Alaska Native Policy the Department of Commerce (March 30, 1995)*.
  - ❑ Appendix is an integral part of the SO and all parts of SO apply to this Appendix.
-

# Appendix – Sec.2. General Policy

---

A. **Goals** ... provide basis for administration of the Act in a manner that

- (1) Recognizes common federal-tribal goals of conserving sensitive species and their ecosystems, Indian self-government, and productive government-to-government relationships;
  - (2) Harmonizes federal trust responsibility, tribal sovereignty, and statutory missions of Departments ... to avoid or minimize potential for conflict or confrontation.
-

# Appendix – Sec.2. General Policy

---

- B. **Government-to-Government Communication** ... responsibility of regional and field offices to maintain current list of tribal contact persons ...and ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.
  - C. **Agency Coordination**. BIA has primary responsibility for carrying out federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations ... Services shall consult with each other, tribes, BIA, Office of Solicitor, Office of American Indian Trust, Office of General Counsel in determining how the fiduciary responsibility of federal government to Indian tribes may best be realized.
-

# Appendix – Sec. 2. General Policy

---

- D. Technical Assistance.** In roles as trustees offer and provide technical assistance and information for development of tribal conservation and management plans to promote maintenance, restoration, and enhancement their ecosystems ..... May include:
- cooperative identification of appropriate management measures ...
  - intergovernmental agreements to enable tribes to more fully participate in conservation programs ...
  - conservation easements with tribal governments and enlist tribal participation in incentive programs.
-

# Appendix – Sec. 2. Goals

---

## E. Tribal Conservation Measures.

- Upon request of tribe, or BIA, **cooperatively review and assess tribal conservation measures** for sensitive species which may be included in tribal resource management plans.
  - Communicate to tribal government **desired conservation goals and objectives** .. Any technical advice or suggestions for modification of plan to enhance its benefits for conservation of sensitive species.
  - Consult on government-to-government basis with affected tribe to **determine and provide appropriate assurances that would otherwise be provided to a non-Indian.**
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## A. Candidate Conservation

- (1) Solicit and utilize expertise of affected Indian tribes in evaluating which animal and plant species should be included on list of candidate species, including conducting population status inventories and geographical surveys;
  - (2) Solicit and utilize expertise of affected Indian tribes when designing and implementing candidate conservation actions.
  - (3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measure to conserve candidate species on Indian lands.
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## B. The Listing Process

- (1) **Timely notify** affected tribes of petitions to list species, which could affect exercise of tribal rights or use of tribal trust resources ... **utilize expertise** of affected tribes in responding to such listing petitions.
  - (2) Recognize **right of tribes to participate fully** in listing process ... providing timely notification to, soliciting information and comments from, and utilizing expertise of, tribes whose exercise of tribal rights or tribal trust resources could be affected by particular listing.
-



# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## B. The Listing Process

### (2) - Continued

This process apply to proposed and final rules to:

- (i) list species as endangered or threatened
  - (ii) designate critical habitat
  - (iii) reclassify species status
  - (iv) remove species from list
  - (v) designate experimental populations
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## B. The Listing Process

- (3) Recognize contribution to be made by affected tribes, throughout the process and prior to finalization and close of public comment period, in review for proposals to designate critical habitat and evaluate economic impacts with implications for tribal trust resources or exercise of tribal rights ... notify affected tribes, and BIA, and solicit information on, but not limited to cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development for use in:
- (i) preparation of economic analyses involving impacts on tribal communities; and,
  - (ii) preparation of “balancing tests” to determine appropriate exclusions from critical habitat and in review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## B. The Listing Process

- (4) **Consult** with affected tribes when considering designation of **critical habitat** in area that may impact tribal trust resources, tribally-owned fee lands, or exercise of tribal rights.
- Critical habitat shall **not be designated in such areas unless determined essential** to conserve a listed species.
  - In designating critical habitat ... **evaluate and document** the extent to which **conservation needs** of listed species can be **achieved by limiting designation to other lands**.
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## (B) The Listing Process

(5) Section 4(d) ... when exercising regulatory authority under this section:

**Avoid or minimize effects** on tribal management, economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

---

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## (B) The Listing Process

(6) After providing affected tribe(s) **opportunity to actively review and comment** on proposed listing actions, provide affected tribe(s) with **written explanation** whenever final decision on any of **following conflicts with comments provided by an affected tribe**:

- (i) listing of a species;
- (ii) designate critical habitat;
- (iii) reclassification of listed species;
- (iv) removal of species from the list;
- (v) designate experimental populations.

If affected tribe petitions for rulemaking under Section **4(b)(3)**, **consult with and provide written explanation** to the affected tribe **if fail to adopt requested regulation**.

---

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## C. ESA Section 7 Consultation

(1) Facilitate use of best available scientific and commercial data ... solicit information, traditional knowledge, and comments from, and utilize expertise of, affected tribes in addition to action agency data.

Provide timely notice to affected tribes as soon as aware that proposed action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to maximum extent permissible by law

---

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## C. ESA Section 7 Consultation

### (3)(a) Formal consultation with BIA

- Treat **affected tribes as license or permit applicants** entitled to **full participation** on consultation process.
- Includes **invitations to meetings** with BIA, providing pertinent data, **review data in admin record**, review BA and draft BOs.
- **Tribal conservation and management plans** for tribal trust resources **serve as basis for RPAs**, to extent practicable.

### (3)(b) Formal consultations with other DoI or DoC agency

- **Action may affect** tribal rights or tribal trust resources
  - **Notify affected tribes(s)**
  - **Provide for participation** of BIA in consultation process.
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## C. ESA Section 7 Consultation

### **(3)(c) Formal consultation with non-DoI/DoC agency**

- Proposed action may affect tribal rights/tribal trust resources.
- Notify affected Indian tribe(s) and encourage action agency to invite them and BIA to participate in consultation process.

### **(3)(d) Developing RPAs**

- Give full consideration to all comments and information from any affected tribe,
  - Strive to ensure any alternative selected not discriminate against tribe.
  - Make written determination:
    - (i) How selected alternative is consistent with trust responsibility.
    - (ii) Extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.
-



# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## D. Habitat Conservation Plans

**(1) Solicit information, traditional knowledge, and comments from, and utilize expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources ... Facilitate tribal participation by providing timely notification as soon as aware draft HCP may affect such resources or exercise of such rights.**

**(2) Encourage HCP applicants to recognize benefits of working cooperatively with affected Indian tribes and advocate for tribal participation.**

- **Where tribes not invited to participate ... consult with affected tribes to evaluate effects of the proposal on tribal trust resources ... provide such information to HCP applicant prior to submission of draft HCP for public comment.**
  - **After consultation with tribes and non-federal landowner, and after careful consideration of tribe's concerns ... must clearly state rationale for recommended final decision and explain how the decision relates to trust responsibility.**
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## D. Habitat Conservation Plans

**(3) Advocate incorporation of measures into HCPs that will restore or enhance tribal trust resources ... advocate for provisions that eliminate or minimize diminishment of tribal trust resources ... be cognizant of impacts of measures incorporated into HCPs on tribal trust resources and tribal ability to utilize such resources.**

**(4) Advocate and encourage early participation by affected tribal in development of region or state-wide HCP efforts and development of any related implementation documents.**

---

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## E. Recovery

(1) **Solicit and utilize expertise** of affected Indian tribes by having **tribal representation**, as appropriate, on Recovery Teams when species occurs on Indian lands, affects tribal trust resources, or affects exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to **develop and implement Recovery Plans in manner that minimizes social, cultural, and economic impacts** on tribal communities consistent with timely recovery of listed species.

- Be cognizant of tribal desires to attain population levels and conditions that are sufficient to **support the meaningful exercise of reserved rights and protection of tribal management or development prerogatives for Indian resources.**
-

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## E. Recovery

(3) **Invite** affected tribes, or designated representatives, to **participate in Recovery Plan implementation process** through development of a participation plan and through tribally-designated membership on recovery teams. ... work cooperatively with affected tribes to **identify and implement most effective measures to speed recovery process.**

(4) **Solicit and utilize expertise** of affected tribes in **design of monitoring programs** for listed species and delisted species occurring on Indian lands or **affecting exercise of tribal rights or tribal trust resources.**

---

# Appendix – Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

---

## **F. Law Enforcement**

**(1) At request of tribe, enter into cooperative law enforcement agreements as integral components of tribal federal, and state efforts to conserve species and their ecosystems ... may include delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.**

**(4) Cooperate wit tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.**

---